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RE: Federal Consultation of the Definition of "Water of the United States"

Dear Ms. Downing and Mr. Hanson,

The Western Municipal Water District ("District") is a water wholesale agency located in Riverside County, California. The District provides water and wastewater services to retail customers and wholesale agencies throughout the Inland Empire. The District is a member agency of Metropolitan Water District of Southern California, and receives most of its water from northern California via the Sacramento-San Joaquin Bay-Delta and from the Colorado River.

The District submits this letter to EPA pursuant to Executive Order 13132. As you are aware, EO 13132 requires EPA to consult with local government agencies (or their representative national organizations) prior to issuing any regulation that may impose substantial direct compliance costs on state and local governments or preempt state or local law. EPA has proposed rescinding and revising the definition of the term "Waters of the United States" ("WOTUS") for the purposes of the federal Clean Water Act (33 U.S.C. 1251 et seq.). EPA's proposed action may impose substantial direct compliance costs the District, and may also preempt state or local regulations applicable to the District. The District appreciates the opportunity to provide comments on EPA's proposal, and looks forward to working with EPA on revisions to the 2015 promulgated definition of WOTUS.

Background

In July, 2015, the EPA issued a final rule revising the definition of the term "WOTUS. The 2015 rule stretched the definition of to its maximum supportable extent. The apparent intent was to reach the most headwaters and tributaries possible and thereby give the Clean Water Act the maximum supportable reach. The flaw in this approach is that the 2015 rule classified man-made infrastructure as waters of the United States including many water supply facilities. These include aqueducts, reservoirs, irrigation channels, infiltration basins, and pipelines connecting such facilities.

During the rulemaking process, the District actively engaged EPA on application of the definition to water supply facilities. EPA staff included specific exclusions from the definition of the term with the intent of preventing over-application of the Clean Water Act to the District's facilities. Unfortunately the exemptions did not go far enough, and the final definition remains capable of being construed as

applying to many water supply facilities. Additionally, EPA included comments in the preamble to the final rule claiming the authority to regulate a range of water supply infrastructure as WOTUS.

Application of the Clean Water Act to water supply infrastructure substantially interferes its operation and usefulness. Water quality standards and TMDLs are applied in system and dredge and fill permits are required for maintenance. Federal permitting in turn triggers consultation under the federal endangered species act. In some cases, the regulatory burden created by application of the Clean water Act completely obfuscates the purpose of the facility. In others, it prevents environmentally beneficial projects from being constructed in the first place.

Without question, some water supply facilities are WOTUS. Large reservoirs constructed on major river systems that have a history of use in interstate commerce likely qualify as WOTUS. However, the 2015 Rule went much further and captured existing infrastructure that was never intended to be held to the Clean Water Act's fishable, swimmable standards, including canals, aqueducts and reservoirs that were built on or across ephemeral streams and dry canyons.

Pursuant to President Trump's February 28, 2017 Executive Order, EPA is rescinding the 2015 Rule and considering reissuing a revised definition of the term WOTUS that is consistent with Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

It is essential that any revisions to the definition of WOTUS be consistent with the text of the CWA and its implementing regulations. When interpreting statutes, the place to begin is with the statutory text and "'[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 133 S. Ct. 1886, 1889 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 84, 91 (2006)); *see also Rapanos*, 547 U.S. at 754-55 (J. Scalia) (stating the principal problem with Justice Kennedy's opinion was his reading of the Supreme Court's prior decisions "in utter isolation from the text of the [Clean Water] Act").

We are writing to request that when EPA begins revising the 2015 Rule, that the agency reconsider how water supply infrastructure is classified. We believe that an explicit exclusion for water supply infrastructure will protect water supply agencies from interference by regulatory agencies or citizens groups who may seek to control water supply operations. This approach is consistent with Justice Scalia's opinion in the Rapanos case and is fully supported by existing case law defining the reach of the Clean Water Act.

Water Conveyance Systems are not "Waters of the United States"

California depends on aqueducts, irrigation canals and other conduits to move water across vast distances and supply water to a thirsty populace. The 2015 Rule inappropriately implemented definitions of the terms "tributary" and "adjacent" that explicitly applied to man-made and man-altered facilities. These definitions were so expansive that they capture California's water conveyance and delivery system.

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Recognizing the need to exempt water supply infrastructure from the expansive definition promulgated in 2015, the EPA included a limited exemption for certain facilities that were constructed "in dry land." While helpful, the exemption did not go far enough. Numerous types of facilities still fell within the broad definition of "Waters of the United States."

The District is a member agency of the Metropolitan Water District of Southern California. As a member agency, the District is reliant on water imported into southern California from across the State via aqueducts, pipelines and storage reservoirs. A definition of WOTUS that captures this infrastructure puts the entire system at risk.

Locally, the District is currently planning a project to construct recharge ponds over the Arlington Groundwater Basin in Western Riverside County, California. This project would capture storm water and urban runoff and redirect it to percolation basins that would facilitate groundwater recharge. The percolation basins could also be filled with non-potable and recycled water depending on availability and need. Developing this local water resource would help California to sustainably support its water supply needs during drought conditions.

Under the 2015 Rule, the District is concerned that the percolation ponds could be construed as WOTUS because they are in proximity to the Santa Ana River. If they are considered to be WOTUS, a Clean Water Act section 404 or other NPDES permit would be required for maintaining the ponds once they are constructed. Moreover, the percolation basins will be located adjacent to natural drainage ditches and/or manmade channels that convey storm water and urban runoff. These ditches and channels are similarly at risk of being construed as WOTUS under the 2015 Rule and could further impact the District's planned project.

The cost to construct recharge basins is significant and must be factored into the cost to produce and deliver the water. In the case of the Arlington Recharge Project the budget is $10 million. The project was made economically feasible by the contribution of local and State grants amounting to $2 million. With the additional burden of obtaining federally issued or required permits to maintain the project once it is complete, and potential limitations imposed based on the quality of source water, this project could become financially infeasible.

The District's neighboring entity, Eastern Municipal Water District (EMWD), was placed similarly at risk by the 2015 Rule. EMWD utilizes nearly 100 percent of the recycled water it generates. Recycled water comprises 30 percent of its entire water supply portfolio – over 35,000 acre feet annually. With the assistance of the U.S. Bureau of Reclamation's (USBR) Title XVI program, EMWD has developed 5,714 acre-feet of seasonal storage, five million gallons of elevated storage (to pressurize the system), 200 miles of recycled distribution water pipeline, and 19 pumping facilities. EMWD currently has greater demand than supply for recycled water and in response has prepared unique allocations for customers. Under the 2015 Rule, 10 EMWD recycled water storage sites are at risk of being construed as WOTUS unless they qualify for the "dry land" exemption. If that is the case, regular maintenance and vegetation removal of these 500 acres of ponds would require Section 404 permits. This added

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regulatory burden would not only increase the cost of recycled water, and potentially delay further development of recycled water storage ponds, but also hamper the development of this drought-proof water supply.

Many arid western states use surface infiltration as a management tool to prevent flooding, store excess water for future use, replenish groundwater supplies, mitigate salt water intrusion, or abate land subsidence. The most economical manner of groundwater recharge is to construct a basin in alluvial material immediately adjacent to a perennial or ephemeral stream. This allows water to rapidly infiltrate through the basin to the unsaturated zone where it is added to the aquifer below. In addition to the basins, flood control dikes, swales and ditches are used to capture and convey stormwater to protect public safety. Examples of these facilities can be found all over California, and a few of these projects are described below.

- Santa Ana River spreading basins. A $35 million project is underway to expand and enhance stormwater recharge at an existing recharge site near the headwaters of the Santa Ana River. It is a joint project between Riverside Public Utilities, San Bernardino Valley Municipal Water District, San Bernardino Valley Water Conservation District and Western Municipal Water District. Once completed up to 80,000 acre feet of stormwater water per year to be diverted and recharged into the groundwater basin to improve water supply reliability, protect water quality, and help restore and improve ecosystems.
- Coachella Valley flood protection. The Coachella Valley is an arid desert region averaging less than three inches of rain per year. However the surrounding mountains are subject to much higher rainfall rates which can produce unpredictable, damaging, and even deadly flash flooding events throughout the Coachella Valley. To protect the region from flooding, the Coachella Valley Water District maintains nine stormwater retention basins (approximately 330 acres), 73 miles of flood control dikes, and over 100 miles of swales and ditches designed to capture and convey stormwater.
- Coachella Valley Water District's earthen percolation pond groundwater replenishment facilities. Two of these facilities are located adjacent to jurisdictional waters, and all four are located in a flood plain and percolate Colorado River water. Due to their location in the flood plain and adjacency to jurisdictional waters, these facilities are often altered by storm flows and require earth moving work to maintain functionality and efficiency. Additionally, these facilities are instrumental to life in this desert climate because they replenish the primary water supply.
- The Rio Hondo Spreading Grounds next to the Rio Hondo River in the Central Basin of Los Angeles County. The Rio Hondo River is a concrete drainage channel classified as a "Waters of U.S." The spreading grounds are filled by flowing stormwater, recycled water and/or imported water down the river channel and moving it into the spreading grounds. Both the river and spreading grounds have water in them only during storm events or man-made decisions to move water down to or into them.
- Recharge in Cactus Basins. San Bernardino Valley Municipal Water District is working in partnership with the San Bernardino County Flood Control District and West Valley Water

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District to facilitate recharge of State Water Project (SWP) water in the Cactus Basins for replenishment of the Rialto – Colton Groundwater Basin. The project consists of modifications to the existing Lytle Creek Turnout, a hydroelectric generation unit, and dual-purpose pipelines to provide flood control and recharge benefits at an estimated cost of $6 million. Initially, the goal for SWP recharge in the Cactus Basins is 7,000 AFY.

- The Riverside North Aquifer Storage & Recovery Project is designed to capture and recharge stormwater and facilitate State Water Project recharge to the Rialto-Colton and Riverside groundwater basins for subsequent extraction and use. The project would have the capacity to divert up to 200 cubic feet of water per second between the in-channel, off-channel, and diversion facilities. The centerpiece of the project is an inflatable dam measuring approximately 810 feet long across the Santa Ana River by 6 feet high. Project proponents include San Bernardino Valley Municipal Water District, the Riverside Public Utilities, and Western Municipal Water District.
- The Cañada Gobernadora Multipurpose Basin project ("Gobernadora Basin") is located within an unincorporated portion of southeastern Orange County, just south of the community of Coto de Caza in Santa Margarita Water District. The proposed basin will capture and naturally treat urban runoff and storm flows, and use that water to help meet irrigation demands in the nearby community. The Gobernadora Basin project will consist of a storm detention basin and a natural treatment system, a system to capture and divert flows to the wetlands, a pump station, and a pipeline to deliver flows to the Portola Reservoir, a recycled water reservoir located in Coto de Caza.
- Yucaipa Basin Recharge. This is a joint project between San Bernardino Valley Municipal Water District, San Bernardino County Flood Control District, South Mesa Water Company, Yucaipa Valley Water District, Western Heights Water Company and the City of Yucaipa. The project will involve the capture and recharge of local storm water and imported water in, and adjacent to, natural streams in the Yucaipa Basin to increase water supply reliability and protect water quality.

All of the examples described above are examples of environmentally beneficial water supply projects that the District and other similarly situated local government agencies rely on as a critical aspect of their water supply portfolio. Classifying them as WOTUS substantially interferes with their purpose as water supply facilities. Congress did not intend that outcome. The District therefore requests all water infrastructure, including but not limited to recycled water facilities, groundwater recharge basins, stormwater retention basins, and constructed wetlands, adjacent to "waters of the United States" be excluded from jurisdiction under the revised CWA rule.

Legal Basis for Exclusion

As noted above, it is essential that any revisions to the definition of WOTUS are consistent with the text of the CWA and its implementing regulations. When interpreting statutes, the place to begin is with the statutory text and "'[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 133 S. Ct. 1886, 1889 (2013) (quoting *BP*

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Am. Prod. Co. v. Burton, 84, 91 (2006)). After the Agencies have determined that the revised definition of WOTUS is consistent with the CWA and its implementing regulations, they can then consider whether it is also consistent with U.S. Supreme Court decisions interpreting the CWA, including Justice Scalia's opinion in *Rapanos*.

The Clean Water Act explicitly reserves state authority over water supply. Section 101(g) of the Act states that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." It further states that "nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." (33 U.S.C. § 1251(g). Similarly, section 510 states that the Act shall not be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." (33 U.S.C. § 1370.) The Clean Water Act is thus very clear that it is not be construed in a manner that interferes with any states' authority to "allocate quantities of water" or otherwise impairs or obstructs their rights to regulate water.[1]

The Supreme Court has been clear that administrative actions that expand federal regulation into areas of traditional state control are only on allowed when there has been a clear statement of intent from Congress:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."
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> (SWANCC at 172-173 [citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Bass*, 404 U.S. 336, 349 (1971). *See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).])

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[1] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004) ["the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the Act"] (internal citations omitted); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 963(9th Cir. 2006) [same].

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With regard to water supply facilities, the plain text of the Clean Water Act directs the federal government to take a "hands off" approach. Water supply facilities that are integral to the collection, transport and storage of water are not WOTUS. Any revised regulation should include a specific exclusion for this type of infrastructure.

We request that EPA reconsider the concept of navigability as used in the Clean Water Act. The Clean Water Act was based on the Rivers and Harbors Act (33 U.S.C. 400 et seq.). The Supreme Court articulated the test for navigability in *The Montello*, 87 U.S. (20 Wall.) 430,441-42 (1874), holding: "[i]f it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it [the waterway] is navigable in fact, and becomes in law a public river or highway." [2]

Susceptibility to use as a highway of commerce is central to finding jurisdiction over what are traditionally areas of state control. In *U.S. v. Appalachian Elec. Power Co*, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose, and even if limited improvements are necessary to make the water passable for commerce. The qualifying criteria again being whether the water is used as "a highway of commerce." (*Id*. at 407.)

Differentiating between man-made or man altered facilities and navigable waters can be difficult. When the Supreme Court has considered the issue, it has always concluded that facilities are navigable waters if they are used or are capable of being used as avenues of interstate commerce. In *Ex Parte Boyer*, 109 U.S. 629 (1883), the first case in which the Supreme Court extended federal jurisdiction to man-made waters, the Court did so on the grounds that the canal at issue was designed for navigation:

> Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States.
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> (*Ex Parte Boyer*, 109 U.S. 629, 632 (1883) [emphasis added].)

More recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court found that a modified fish pond on the Hawaiian island of Oahu became navigable and subject to the Rivers and Harbors Act only after it was converted from a shallow, landlocked pond, into a marina with a surface connection to the Pacific Ocean.

[2] In *The Daniel Ball*, 77 U.S. 557, 563-64 (1870), the Court found the requisite commerce if the goods being carried were moving interstate, even if the steamer was not. *Id*. at 565.

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In *Finneseth v. Carter*, 712 F.2d 1041 (1983), the Sixth Circuit Court of Appeals considered whether Dale Hollow Lake which straddles the border between Tennessee and Kentucky was navigable in fact. The Lake was man-made and had no navigational connection to downstream waters. The Court of Appeals held "an artificial water body, such as a man-made reservoir, is navigable in fact . . . if it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water" in contrast to "reservoirs created by lockless dams were wholly within the confines of one state." (Id.)

The common denominator in any analysis – whether it is man-made or natural water body at issue, is whether the water is "susceptible to use as a highway of commerce" or constructed with the intent to be used as the same. Water supply facilities built on traditional navigable waters remain jurisdictional, those that are constructed on what may have qualified as tributaries or adjacent wetlands if they were analyzed under the 2015 Rule would not.

This approach is consistent with Justice Scalia's opinion in the Rapanos case. In that case, the Court considered whether various wetlands connected to geographically distant navigable-in-fact waters qualified as WOTUS. Justice Scalia found that they did not and focuses his rationale on the distinction between waters that are streams, lakes and rivers in the "ordinary parlance" and other man-made features. (Rapanos at 739) Justice Scalia specifically discussed the difference between traditional navigable waters and manmade conveyances:

> It is also true that highly artificial, manufactured, enclosed conveyance systems--such as "sewage treatment plants," and the "mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents" of the city of Knoxville's "system of waterworks," likely do not qualify as "waters of the United States," despite the fact that they may contain continuous flows of water.

Justice Scalia specifically cited a number of lower court decisions differentiating between waters of the United States and point sources as defined by the Clean Water Act:

> Cases holding the intervening channel to be a point source include *United States v. Ortiz*, 427 F.3d 1278, 1281 (CA10 2005) (a storm drain that carried flushed chemicals from a toilet to the Colorado River was a "point source"), and *Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (CA2 1991) (a culvert connecting two bodies of navigable water was a "point source"), rev'd on other grounds, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). Some courts have even adopted both the "indirect discharge" rationale and the "point source" rationale in the alternative, applied to the same facts. See, e.g., *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118-119 (CA2 1994). On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States.

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An exemption for water supply facilities is therefore consistent with both Justice Scalia's decision in the Rapanos case, and the underlying structure of the Clean Water Act.

Conclusion

The District appreciates the opportunity to provide comments on "the opportunities and challenges that exists when taking Justice Scalia's approach to implementing the Clean Water Act (CWA)". During the prior rule development process, the District also requested the exemptions discussed in this letter. Addressing the specific concerns presented in this letter is consistent with the ruling by Justice Scalia in Rapanos and will ensure water quality is protected without imposing unnecessary new burdens on the public water agencies.

If you have any questions about the District's comments, please do not hesitate to contact Michael Hadley, Government Affairs Officer at 951-571-7226, or by email at mhadley@wmwd.com.

Sincerely,

JOHN V. ROSSI
General Manager

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